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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

STEVEN ROBERTSON CUMMING,

Plaintiff and Appellant,

v.

NATALIE ANN BLICKENSTAFF, as  
Trustee, etc.,

Defendant and Respondent.

E069282

(Super.Ct.No. PROPS1301068)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cynthia Ann Ludvigsen, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Steven Robertson Cumming, in pro. per., for Plaintiff and Appellant.

The Law Office of Jennifer Daniel and Jennifer Daniel for Defendant and Respondent.

This is the second of three appeals arising out of the administration of the Robert Bruce Cumming and Lois Wielen Cumming Trust (trust). The first appeal covered the trial regarding the removal of plaintiff and appellant Steven Robertson Cumming (Steven) as trustee and the determination of whether he had committed neglect and financial elder abuse against Lois Cumming (Lois).<sup>1</sup> (*Cumming v. Cumming* (Sept. 7, 2017, E066569) [nonpub. opn.], mod. Sept. 28, 2017 (*Cumming I*, E066569).) In this current (second) appeal (*Cumming II*, E069282), Steven challenges the order denying his petition to remove respondent Natalie Blickenstaff (Blickenstaff) as trustee of the trust. In a companion (third) appeal, Steven challenges the orders overruling his objections to Blickenstaff's second and final account (second account), approving Blickenstaff's second account, ordering service of documents by United States mail only (prohibiting electronic service), denying Steven's motion to presume invalid service, denying Steven's petition to establish final distributions based on Steven's account, and denying Steven's memorandum of costs. (*Blickenstaff v. Cumming* (Aug 16, 2019, E070538) [nonpub. opn.] (*Cumming III*, E070538).)<sup>2</sup>

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<sup>1</sup> Because the Cumming family members share a common surname, we use first names after initial introduction to avoid confusion. No disrespect is intended.

<sup>2</sup> On the court's own motion, we take judicial notice of our prior unpublished opinion in *Cumming I*, E066569, and the companion appellate record in *Cumming III*, E070538, to compile a coherent narrative. (Evid. Code, § 452, subd. (d); Cal. Rules of Court, rule 8.1115(b)(1).) "It is well accepted that when courts take judicial notice of the existence of court documents, the legal effect of the results reached in orders and judgments may be established." (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 185.)

In this appeal, Steven contends, inter alia, the probate court abused its discretion in denying his petition to remove Blickenstaff as trustee. We conclude he lacks standing to petition for the trustee's removal. Accordingly, the court properly denied his petition.

## I. PROCEDURAL BACKGROUND AND FACTS<sup>3</sup>

### A. *Factual Overview.*

Steven, Janet, and William are siblings. Their parents, Robert and Lois Cumming, established a trust. Robert died in 1991. In accordance with the trust agreement, Lois then divided the trust into Trust A, a revocable trust for which Lois was the trustee and retained the power to amend, and Trust B, a trust that became irrevocable on Robert's death but under which Lois was the income beneficiary while she was alive. Lois was the sole trustee of Trust A. Trust B provided for two trustees. Pursuant to the trust agreement, Steven became the successor trustee when Robert died. Lois was the other trustee. (See *Cumming I*, E066569.)

In May 2005, Lois suffered a stroke. She spent several months in the hospital and in rehabilitation facilities. On June 17, 2005, while Lois was residing in a rehabilitation facility following her stroke, Steven obtained a power of attorney appointing him Lois's attorney in fact. She returned home in September 2005. In the weeks immediately after the stroke, Steven moved into Lois's house. He remained there to care for her until her death in April 2013. While he lived with Lois, Steven's personal bills and expenses were

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<sup>3</sup> The facts are taken from our previous nonpublished opinion in this case. (See *Cumming I*, E066569.)

paid by the trusts; however, he failed to provide records to back up his explanations for his financial actions. (See *Cumming I*, E066569.)

*B. Appeal from the Petition Filed by Janet and William (Cumming I, E066569).*

On December 31, 2013, Janet and William filed a petition, pursuant to Probate Code sections 16080 and 17200, subdivision (b)(5), (6), (7) and (10), to compel Steven, as the acting successor cotrustee of the trust to: (1) report information concerning the trust; (2) account; (3) allow beneficiaries and/or the other successor cotrustee reasonable access to view trust property; and/or (4) remove the acting successor cotrustee and appoint a private professional second successor trustee. The petition alleged, among other things, that Steven, as acting successor cotrustee, had maintained exclusive control over the trust's assets, had used them for his own benefit, and had refused requests by Janet for information concerning the trust's assets. (See *Cumming I*, E066569.)

On March 26, 2014, Blickenstaff was appointed as trustee of the trust pursuant to a petition filed by Janet and William. On January 20, 2015, Janet and William filed a supplement to the original petition, under Probate Code section 259 and Welfare and Institutions Code sections 15610.30 and 15610.57, alleging that Steven had committed neglect and financial elder abuse against their mother, Lois, and seeking to disinherit Steven. (See *Cumming I*, E066569.) The matter was tried before the probate court. On June 24, 2016, the court entered judgment. The court found that Steven had breached his duties as trustee in a number of specified respects, but found the evidence insufficient to establish financial elder abuse. The court also found that Steven was liable for neglecting his mother, and that he acted recklessly and in bad faith. The court removed Steven as

trustee. It also deemed him to have predeceased Lois and found that he was not entitled to “take further” under the will, the trust, or by intestate succession. It denied him compensation for his services for failure to submit a bill within one year after Lois’s death and denied his claim for attorney fees. It also surcharged him a total of \$193,136. The surcharge was doubled to \$386,272, pursuant to Probate Code section 859. (See *Cumming I*, E066569.)

On July 29, 2016, Steven appealed the judgment. We reversed in part and affirmed in part, finding the probate court did not award damages under Probate Code section 259 and, thus, could not disinherit Steven. (See *Cumming I*, E066569.) Otherwise, we upheld the court’s rulings and findings including the full surcharge; however, we found factual questions: (1) whether Steven’s one-third share of the trust estate and of any other assets Lois may have possessed outside of the trust would exceed the amount of the surcharge, and (2) whether Janet had issue or had attained the age of 40 before her death.<sup>4</sup>

*C. Steven’s Petition to Remove Trustee and Objections to First Accounting.*

On July 14, 2016, during the pendency of the appeal in *Cumming I*, E066569, Blickenstaff filed her first and final account (first account) after being appointed as trustee on July 11 (she had previously served as interim trustee). Six days later, she filed a supplement to the first account. On July 25, Steven moved ex parte to (1) remove Blickenstaff as trustee on the grounds of perjury and malfeasance, and (2) order a proper

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<sup>4</sup> Janet died in August 2016.

report and accounting. Four days later, the ex parte motion was denied because it was not an emergency, and the matter was set for hearing in September 2016.

On August 1, 2016, Steven filed objections to Blickenstaff's first account and supplement; the objections offered the same arguments Steven had made in his motion to remove Blickenstaff. On September 12, the probate court overruled Steven's objections, but declined to approve the first account and distribution pending the appeal. Steven's motion to remove Blickenstaff was continued to December 8 but taken off calendar for lack of service.

On December 9, 2016, Steven filed a second petition to remove Blickenstaff as trustee for perjury and malfeasance. On April 10, 2017, the probate court reviewed Steven's petition and the trustee's response, and heard argument by the parties. The court denied the petition for lack of standing and lack of merit. The court found Steven lacked standing because he had been disinherited, and his surcharges exceeded his interest in the trust. However, the court indicated Steven's standing could change if the appeal on the issue of disinheritance was resolved in his favor. Regarding lack of merit, to the extent Steven's claims and arguments repeated those raised in his objections to Blickenstaff's accounting, they were denied because they had already been decided. (See *Cumming II*, E069282.)

On September 7, 2017, we issued our opinion in *Cumming I*, E066569, and filed a modification on September 28.

On October 6, 2017, Steven appealed the denial of his petition to remove Blickenstaff as trustee.<sup>5</sup>

## II. DISCUSSION

### A. *Preliminary Observation.*

Steven’s opening brief is at times difficult to understand, and he often fails to support legal arguments with appropriate analysis that applies legal authority to the facts of his case. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [“Each brief must [¶] . . . [¶] [s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority.”]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.) Notwithstanding these procedural issues, Steven asserts many alleged deficiencies in the probate court’s proceedings, most of which appear to involve issues that were not designated in Steven’s notice of appeal. Our review is limited to the issues raised in his notice of appeal directed at the probate court’s order on April 10, 2017. Thus, we do not consider any deficiencies to the court’s actions that occurred prior to June 24, 2016, because they were raised, *or should have been raised*, in Steven’s prior appeal in *Cumming I*, E066569. (See Code Civ. Proc., § 906.)

Although Steven represents himself, he has the same burden to demonstrate reversible error as he would if he were represented by counsel. ““A fundamental principle of appellate practice is that an appellant ““must affirmatively show error by an

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<sup>5</sup> William died in August 2018.

adequate record. . . . Error is never presumed. . . . “A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent.”””” ( *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639.) Additionally, an appellant has the burden of overcoming the presumption that a judgment is correct by presenting “an analysis of the facts and legal authority on each point made,” and by supporting the “arguments with appropriate citations to the material facts in the record. If he fails to do so, the argument is forfeited.” ( *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.)

Applying these principles to the present case, we conclude Steven did not meet his burden as appellant of overcoming the basic presumption that the probate court’s rulings are correct.

*B. Recall of the Remittitur in Cumming I, E066569, Is Not Available.*

By way of his first two arguments, Steven seeks a recall of the remittitur in *Cumming I*, E066569. He contends: (1) the opinion in *Cumming I*, “should have found the judgment void in lieu of reversing in part and affirming in part”; and (2) the opinion should have vacated the judgment for “lack of jurisdiction.” We conclude this remedy is not available to him.

“For good cause, a remittitur may be recalled (Cal. Rules of Court, rule 8.272(c)(2)), but good cause is limited.” ( *In re Richardson* (2011) 196 Cal.App.4th 647, 663.) “Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence.” ( *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 165.) The remedy of recalling the remittitur permits “the court to *set aside*



*an erroneous judgment on appeal obtained by improper means.* In practical effect, therefore, the motion or petition to recall the remittitur may operate as a belated petition for rehearing on special grounds, without any time limitations.” (*Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 191.) However, “long or unexcused delay in seeking recall of a remittitur itself justifies the denial of relief. ‘Action must be taken by the moving party *as soon as he learns of the facts upon which the motion is based.*’” (*Id.* at p. 192.)

Here, Steven does not argue that our prior opinion contained clerical errors, or that it was obtained by fraud, mistake, or inadvertence. Because Steven has failed to make the requisite showing that the opinion in *Cumming I*, E066569, was obtained by improper means, the remedy of recalling the remittitur is not available to him.

*C. Steven’s Challenges to the Appointment of Blickenstaff as Trustee, Her Actions Up to and Including Her First Account, and the Probate Court’s Ruling on it Are Untimely.*

Steven contends the probate court’s September 12, 2016 ruling on Blickenstaff’s first account is null and void because the court violated the automatic stay pending his appeal in *Cumming I*, E066569. He asks this court to return the probate proceedings to a pre-first account status. We summarily reject his claim of error. As a matter of law, Steven’s right to make such a claim was lost by his failure to timely appeal from the subject order. (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 222, fn. 2 [“An order settling an account is appealable.”]; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 [“California follows a ‘one shot’ rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited.”].) We will not review or

disturb the trial court's orders or rulings from which an appeal could previously have been taken but was not. (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1347 ["It is well established that an appellate court may not review a decision or order from which an appeal could previously have been taken."]; Code Civ. Proc., § 906.) The same rationale applies to Steven's challenges to Blickenstaff serving as trustee; her failure to provide an accounting in her first year; her prior impartiality, disregard of her duties, and commingling of trust funds; her lack of standing to prepare a forensic accounting of the revocable trust; and the lack of any court supervision over her actions as interim trustee.

Also, we note Steven never raised the issue of Blickenstaff's failure to provide an accounting in her first year, nor did he seek her removal based on her violation of the duty of impartiality, her improper commingling of trusts, or her preparation of a forensic accounting in the probate court. He may not advance new issues and arguments on appeal if they were not presented below. (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1804 ["It is well established that a party may not raise new issues on appeal not presented to the trial court."].)

Moreover, we reject Steven's claim the probate court lacked jurisdiction to rule on the first account. Although the appeal in *Cumming I*, E066569, was pending, the probate court was not divested of all jurisdiction. (*Estate of Kennedy* (1948) 87 Cal.App.2d 795, 797-798 [an appeal from orders confirming a special administrator's sale of estate property did not deprive the probate court of jurisdiction to determine a will contest]; Prob. Code, § 1310, subd. (b) ["Notwithstanding that an appeal is taken from the

judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, . . . from time to time, as if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions.”].) During the administration of the estate, the probate court “is authorized to determine the validity of wills and of creditors’ claims, the rights of rival heirs, the necessity of sales and other incidents of winding up an estate. Each act of the court is an independent step in the administration. A decision as to one is not an adjudication of the others and does not divest the court of the power to hear and determine problems that are collateral to the proceeding in which an appealed order has been rendered. [Citations.] An appeal from a prior order made in the course of administration of an estate does not suspend the powers of the probate court to make further orders. [Citation.] A statute that would prohibit the probate court from administering an estate pending the appeal of an order made in due course would be intolerable.” (*Estate of Kennedy*, at p. 798; see *Estate of Thayer* (1905) 1 Cal.App. 104, 106 [lower court had jurisdiction to settle the final account during pendency of an appeal of the order of partial distribution].)

*D. Res Judicata Bars Relitigation of Janet’s Share of the Trust upon her Death.*

Steven asserts the distribution of any trust property to Janet following her death violated the trust provisions and should be “ruled null and void and found in contempt of due process as a matter of law.” This issue was raised and decided against Steven in his

prior appeal. (See *Cumming I*, E066569.) Our prior opinion is res judicata against him. (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 591 [The doctrine of res judicata is applicable in probate proceedings.]; *Grable v. Grable* (1960) 180 Cal.App.2d 353, 359-360 [“the decision of an appellate court . . . falls within the purview of the doctrine of res judicata and is conclusive of the issues and matters determined by the appellate court”].)

*E. The Probate Court Properly Exercised Its Discretion in Denying Steven’s Petition to Remove Blickenstaff as Trustee.*

Steven challenges the denial of his petition to remove Blickenstaff as trustee. “A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under [Probate Code s]ection 17200.” (Prob. Code, § 15642, subd. (a).) The grounds for removal of a trustee include: “(1) Where the trustee has committed a breach of the trust. [¶] . . . [¶] (4) Where the trustee fails or declines to act. [¶] . . . [¶] (8) If the trustee is substantially unable to resist . . . undue influence. . . . [¶] [and] (9) For other good cause.” (Prob. Code, § 15642, subd. (b).) The decision to remove a trustee is vested within the discretion of the probate court. (*Trolan v. Trolan* (2019) 31 Cal.App.5th 939, 957; *Estate of Gilmaker* (1962) 57 Cal.2d 627, 633.) Here, we discern no abuse of discretion.

In his petition, Steven argued that Blickenstaff should “be removed from office for perjury and malfeasance including: breaches of trust, conflicts of interest, showing favoritism to some beneficiaries to the detriment of others, misleading the court, failure to account, squandering of assets, and not protecting property.” On April 10, 2017, the

probate court denied Steven’s petition on the merits and for lack of standing. Because most of Steven’s claims and arguments had been raised in his objections to the first account, the court found they had already been decided against him. The court also denied the petition for lack of standing based on Steven being disinherited. In Steven’s prior appeal, we overruled the finding that he was disinherited; however, we affirmed the surcharge (\$386,272) against him. (See *Cumming I*, E066569.) Since his surcharge (\$386,272) continued to exceed his interest in the trust (\$343,340.48 [ $\$1,030,021.45 \div 3$ ]), Steven lacked standing to petition for removal of the trustee because he was no longer a “beneficiary.” (Prob. Code, § 15642, subd. (a); see Prob. Code, § 24, subd. (c) [“‘Beneficiary’ means a person to whom a donative transfer of property is made or that person’s successor in interest, and: [¶] . . . [¶] (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.”]; see *Cumming III*, E070738.) The probate court thus properly denied Steven’s petition to remove the trustee.<sup>6</sup>

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<sup>6</sup> On July 31, 2018, Blickenstaff moved to dismiss this appeal on the grounds (1) the issue of recalling the remittitur is not properly before this court, (2) Steven failed to join William as a respondent and real party in interest, and (3) the appeal is moot, frivolous, and taken from a nonappealable order. In view of our conclusion the order denying Steven’s petition to remove Blickenstaff as trustee should be affirmed, we deny the motion to dismiss.

### III. DISPOSITION

The motion to dismiss is denied, and the order denying the petition for removal of the trustee is affirmed. Respondent to recover costs on appeal.

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McKINSTER  
Acting P. J.

We concur:

MILLER  
J.

SLOUGH  
J.